their witnesses, and bind them by the truth of their testimony? The more negligent they have been in the discharge of their duty, the more difficult it will be to extort the truth from them. Could they be expected to swear that the cargo was burnt by their negligence? To place the *onus* upon the plaintiff would be to deny all redress. I admit the general rule that he who alleges must prove. But it is equally well established the burden of proof should be upon him who best knows what the facts are. If it be said that the agents and servants may be resorted to by the shipper as well as the carrier, we have only to repeat that their wishes, feelings and interests are all on the side of their employers. Let the carrier then prove the loss and the manner of the loss. Policy as well as safety of all concerned demand the establishment of such a rule:" *Berry* v. *Cooper*, 28 Ga. 543. In *Baker* v. *Brinson*, 9 Rich. (S. C.) 201, by contract the carrier's liability was limited. In that case, it is said (p. 203) "That is a sound rule which devolves the *onus* on him who best knows what the facts are. In cases of loss, proof of delivery devolves at once on the carrier, the *onus* of exempting himself from liability, and nothing can be more reasonable, before he can take shelter under an exception, to require proof of his *care*."

Many other cases hold the same doctrine: *Whitesides* v. *Russell*, 8 W. & S. 44; *United States* v. *Backman*, 28 Ohio St. 144; *Mann* v. *Birchard*, 40 Vt. 326; *Roberts* v. *Riley*, 15 La. Ann. 103.

Mr. Greenleaf lays down the rule that in all cases of loss of a common carrier the burden of proof is on him, to show that the loss was occasioned by the act of God, or by public enemies: 2 Greenl. on Ev. (14th ed.) § 219. And it has been laid down that if the acceptance of the goods was special, the burden of proof is still on the carrier, to show not only that the cause of loss was within the terms of the exception, but also that there was on his part no negligence or want of due care: 2 Greenl. Ev. (14th ed.) § 219; *Swindler* v. *Hilliard*, 2 Rich. 286; *Whiteside* v. *Russell*, 8 W. & S. 44; *Slocum* v. *Fairchild*, 7 Hill (N. Y.) 292.

See the elaborate exposition of the meaning of the term "act of God," respecting the degree of care to be applied by common carriers in order to entitle them to its protection by COCKBURN, C. J., in *Nugent* v. *Smith*, L. R., 1 C. P. D. 428; 34 L. T. Rep. (N. S.) 827; s. c. 14 Alb. L. J. 164, a decision of the English Court of Appeals. See, also, *Chicago & N. W. Ry.* v. *Sawyer*, 69 Ill. 285; s. c. 18 Am. Rep. 613; *McGraw* v. *B. & O. Rd.*, 18 W. Va. 361; s. c. 41 Am. Rep. 696; *Nashville & Chattanooga Rd.* v. *David*, 6 Heisk. (Tenn.) 261; s. c. 19 Am. Rep. 594; 2 Greenl. on Ev. (14th ed.) § 219 and notes.

EUGENE MCQUILLIN.

St. Louis, Mo.

Supreme Judicial Court of Massachusetts.

RIDGEWAY STOVE CO. *v.* WAY.

An innocent purchaser of certain dwelling-houses, in which furnaces had been attached to and become a part of the realty, is not affected by an agreement between his grantor and the vendor of the furnaces, by the terms of which the latter was to retain the property in the furnaces until they were paid for.

Furnaces placed in the cellar of a house, upon a row of bricks, set in a circle, with pipes fastened to the ceiling of the cellar, and connecting with the chimney and registers of the house, are annexed to and become a part of the realty, and will pass by a deed of the land.

THIS was an action of tort for the conversion of two portable furnaces, with pipes, registers, register borders, and register boxes. At the trial in the Superior Court, without a jury, before KNOWLTON, J., it appeared that one William Coady was the mortgagor in possession of certain real estate in Boston, consisting of two dwelling-houses, with the land under and adjoining them. Said Coady, in July 1884, agreed with the agents of the plaintiff that the plaintiff should place in each of these houses a portable furnace, with the pipes and registers connected therewith; that said furnaces, pipes and registers should remain the property of the plaintiff; that said Coady should pay $100 in cash when the furnaces should be placed in the houses, and thereafter should pay a rental of $35 a month for said furnaces until the rentals, together with $100, should amount to $240, when all title to the furnaces in the plaintiff should cease; and that this lease of the furnaces should be put in writing, and signed by Coady. Coady explained to the agents of the plaintiff that the houses would rent for $30 a month each, and that, with the money thus received, he would be able to pay for the furnaces before the interest on his mortgage and his taxes would have to be paid. The houses had just been built by Coady, and were then ready for occupation. In pursuance of this agreement the agents of the plaintiff took two furnaces from their stock, and set them up in the cellars of the houses. The manner of setting up the furnaces was as follows: Four bricks were set on end on the floor of the cellar. The base rim of the furnace was placed upon these bricks. Other bricks were set on end in a circle under the rim, with the mortar between the bricks, but no mortar between the upper surface of the bricks and the rim; and then the other parts of the furnace were placed upon the rim. The rim, resting on the circle of bricks, made a joint as tight as was necessary. An open space was left in the circle of bricks to allow the air from the cellar (or from out doors, by means of a cold-air box) to pass up through the furnace. At the time of the alleged conversion, a cold-air box had been connected with one of the furnaces, but the other had none. There were holes in the top of the casing of the furnace, and collars were placed in these holes. The hot-air pipes fitted over these collars, resting on the top of the furnace, and were supported at the further end by wires passing under the pipes, and fastened to the ceiling of the cellar. The hot-air pipes were slipped into stationary pipes, which had been placed in the houses by Coady

when the houses were built, leading from the ceiling of the cellar upward, through and between the partitions to the rooms of the house. The smoke-pipe passed into the chimney. Each soap-stone register border was placed in a hole in the floor, resting on a ledge of wood. The registers were set in the several rooms, and each register and register box rested on the soap-stone border, and connected with the stationary pipes. Neither furnaces, pipes, boxes, borders, nor registers were in any other manner attached to the houses or land. There were holes into the chimney from the rooms of the houses, so that stoves could be used to heat the houses.

On September 8th, in pursuance of his previous agreement, Coady signed and delivered to the plaintiff a paper, in which he (Coady) set forth that he had hired and received of the Ridgeway Stove Company the furnaces, pipes, registers, &c., mentioned above, for the use of which he promised to pay said stove company, the sum of $35 a month until the sums paid should amount to $240, when all rent or claim of the stove company, or its representatives, to said furniture, should cease; but in case of neglect of said Coady to pay for said use and rent, before such time as said sums so to be paid for use and rent should amount to the said sum of $240, said stove company and their legal representatives were to have the right to enter any house or place where the said furniture should be, and remove the same. November 26th, the defendant received from Coady a warranty deed of the real estate. There was evidence that it was given as part of an arrangement by Coady to obtain money to effect a compromise with his creditors, and there was no evidence to control the recital of a valuable consideration contained in it. Nothing was said in the deed about the furnaces. In December the plaintiff demanded the furnaces of the defendant, who refused to allow the plaintiff to remove them, and claimed them under his deed from Coady. The plaintiff never has received any money in payment for the furnaces, or for the use of them, but it received an order for $100, drawn by Coady on John S. Lamphrey, and accepted, which it receipted for as a payment of that sum, but which it has not collected.

The defendant testified that he went into one of the houses, and through some of the upstairs rooms, before he took his deed, and saw some of the registers, but that he never saw the furnaces until after this action was brought. There was no evidence offered tending to show that he knew of the existence of the furnaces when he

took his deed, except what appears in these exceptions. There was no other evidence that he ever made any inquiries about the furnaces from Coady, or any one else. The plaintiff offered the testimony of its agent, Rowe, who made the arrangements with Coady, and who placed the furnaces in the houses, as to whether or not the plaintiff, when it placed the furnaces in the houses, intended that they should become a part of the houses, and also the testimony of Coady as to whether or not he intended, when the furnaces were placed in the houses, that they should become a part of the house. The court excluded this testimony, and ruled that the secret intention of Coady and of the plaintiff, not manifested by their acts or words, could not be put in evidence to affect the defendant, but admitted evidence of their acts and agreements.

The court found as a fact that the property claimed in the plaintiff's writ was annexed to and became a part of the realty, and passed to the defendant by his deed; that Coady built his houses with a view to their being heated by furnaces similar to these, and that these furnaces were of a kind ordinarily designed to be kept and used, as long as they are of any value, to heat the houses in which they were originally set up; and that both Coady and the plaintiff intended that the furnaces should become a part of the realty, but that they both further intended that the furnaces should not become a part of the realty until they should be paid for; and ruled that this second intention on their part could have no effect upon the rights of the defendant. The court declined to rule that upon all the evidence the defendant was not a *bona fide* purchaser for value; and found as a fact that he was, and that he had no knowledge or information of any agreement or understanding affecting the rights of an owner of the realty; and also declined to rule that, if the defendant was a purchaser for value, he was put upon his inquiry as to whether the furnaces were a part of the realty or not, and, having neglected to make any inquiries, that he was affected with notice of what he would have found upon inquiry, to-wit, that these furnaces were the property of the plaintiff. The court found for the defendant, and the plaintiff alleged exceptions.

Brown & Keyes, for plaintiff.

E. M. Bigelow, for defendant.

MORTON, C. J.—It is quite clear that the Superior Court was

justified in finding that the property claimed on the plaintiff's writ was annexed to and became a part of the realty, and passed to the defendant by his deed. The property claimed consisted of two portable furnaces, with the pipes and registers attached to them. They were put in as part of the two houses, were essential to the enjoyment and use of them as dwelling-houses, and were intended by the owner to be a part of the realty as soon as they were paid for. The fact that there was an agreement between the owner and the plaintiff that the furnaces should remain the property of the plaintiff until they were paid for, and that both so intended, is immaterial, unless the defendant had notice of such agreement and intention. Notwithstanding such an agreement, the property annexed to the realty will pass to an innocent purchaser without notice: *Southbridge Sav. Bank* v. *Exeter Machine Works*, 127 Mass. 542, and cases cited. As the Superior Court found in the case at bar that the defendant was a *bona fide* purchaser of the houses, without notice of the agreement of the plaintiff, it follows that his rights are not affected by such agreement, and that the property in suit passed by his deed of them. The facts that the defendant did not see the furnaces before he bought, and that he did not make any inquiries about them, are immaterial. He bought the houses as they were, and there was nothing to excite his suspicions, or to put him upon inquiry. The court could not properly rule, as requested by the plaintiff, that, as the defendant made no inquiries, "he was affected with notice of what he would have found upon inquiry, to wit, that these furnaces were the property of the plaintiff."

Exceptions overruled.

Furnaces have, in the past, been quite a fruitful cause of litigation, and the earliest reported cases upon the law of fixtures relate to the right of removing them. Many of the old cases arose between landlord and tenant, and proceed upon distinctions as to the method of attachment which are now untenable.

In the case reported in 20 Henry VII. 13 b., pl. 24, decided in the year 1504 (21 Hen. VII. 26 b., is probably another report of the same case), it was held that a furnace erected by the ancestor, and annexed to the frank-tenement with mortar, was parcel of the realty, and could not lawfully be removed by his executors as against the heir. Doubtless, this furnace was erected for purposes of trade, but the principle involved remains unchanged to this day.

In *Squier* v. *Mayer*, 2 Freem. Ch. 249; s. c. 2 Eq. Ca. Abr. 430, decided in 1701, it was held, on the other hand, that a furnace, though fixed to the freehold and purchased with the house, should go to the executors and not to the heir. This case, so far as it relates to the furnace, may be considered as overruled. See Ewell on Fixtures, p. 214, note.

The general rule undoubtedly is that all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance or mortgage of the freehold where there is nothing to indicate a contrary intention; and furnaces are not an exception to this rule where they are intimately connected with the house: *Main* v. *Schwarzwaelder*, 4 E. D. Smith 273; *Mather* v. *Fraser*, 2 Kay & J. 536; s. c. 2 Jur. (N. S.) 900.

In *Stockwell* v. *Campbell*, 39 Conn. 362, a portable hot-air furnace placed by the owner of the freehold in a pit prepared for it in the cellar of a house, but not set in brick or otherwise fastened to the house or floor, but held in its place by its own weight, together with the smoke-pipe leading therefrom to the chimney, all capable of removal without injury to themselves or the house, but intended as a permanent annexation, as appeared from the pit in the cellar adapted to its size and depth, were held to be a part of the realty, rendering the whole house subject to a mechanic's lien for the value thereof and the labor of setting them in the house.

With respect to the main question in the principal case, there is some conflict of authority. It may be stated as a general rule that fixtures placed upon demised premises by a tenant, and which are removable by him during his term as against his landlord; annexations made upon the land of another under an agreement reserving the right of removal, and also fixtures sold by the owner of the land to a third person but not actually severed, do not pass by a subsequent conveyance or mortgage of the land to one having notice of such right: *Coleman* v. *Lewis*, 27 Penn. St. 291; *Davis* v. *Buffum*, 51 Me. 160; *Wilgus* v. *Gettings*, 21 Iowa 177; *Sowden* v. *Craig*, 26 Id. 156; *Morris* v. *French*, 106 Mass. 326; *Hensley* v. *Brodie*, 16 Ark. 511: *Mitchell* v. *Freedley*, 10 Penn. St. 198; *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279; *Haven* v. *Emery*, 33 N. H. 66; *Pierce* v. *Emery*, 32 Id. 484.

In the case of annexations to the land of another by his consent, under an agreement, express or implied, that the property shall remain the personal property of the person who annexed it, such person being in possession neither of the land nor the annexation thereto, the article annexed is as between the immediate parties to such agreement, unquestionably mere personalty. And by the courts in several states it is held that such annexation retains its character of personalty as against third persons purchasing or taking a mortgage upon the land upon which it stands, *bona fide*, and without notice of such agreement; that it does not pass with the land, and may be removed by the party annexing it as against such *bona fide* purchaser or mortgagee: *Russell* v. *Richards*, 10 Me. 429; s. c. 11 Id. 371; *Hilborne* v. *Brown*, 12 Id. 162; *Tapley* v. *Smith*, 18 Id. 12; *Ford* v. *Cobb*, 20 N. Y. 344; *Godard* v. *Gould*, 14 Barb. 662. See, also, *Mott* v. *Palmer*, 1 N. Y. 564; *Hensley* v. *Brodie*, 16 Ark. 511; *Crippen* v. *Morrison*, 13 Mich. 34; *Sheldon* v. *Edwards*, 35 N. Y. 279; *Tifft* v. *Horton*, 53 Id. 377.

The rule above stated has, however, been often disapproved; and, in our opinion, the better rule, and one more in accordance with the policy of the recording laws of this country, is to require actual severance or notice of a binding agreement to sever, in order to deprive the purchaser or a creditor levying upon the land and fixtures of the right to the fixtures or appurtenances to the freehold: *Fortman* v. *Goepper*, 14 Ohio St. 565; *Brennan* v. *Whitaker*, 15 Id. 446; *Powers* v. *Dennison*, 30 Vt. 752; *Davenport* v. *Shants*, 43 Id. 546; *Hunt* v. *Iron Co.*, 97 Mass. 279; *Haven* v. *Emery*, 33 N. H. 66, 69; *Bringholff* v. *Munenmaier*, 20 Ia. 513; *Fryatt* v. *Sullivan Co.*, 5 Hill 116; *Trull* v. *Fuller*, 28 Me. 545; *Prince* v. *Case*, 10 Conn. 375; *Landon* v. *Platt*, 34 Id. 517.

See, also, *Dostal* v. *McCaddon*, 35 Ia. 318; *Pierce* v. *George*, 108 Mass. 78; *Bratton* v. *Clawson*, 2 Strob. Laws 478; s. c. 3 Id. 127; *Thropp's Appeal*, 70 Penn. St. 395.

A study of these cases convinces us of the correctness of the decision in the principal case, of which, as it seems to us, there can be no reasonable doubt.

M. D. EWELL.

Chicago.

LEGAL NOTES.

THE Court of Errors and Appeals of New Jersey, by their recent decision in *State Board of Assessors* v. *State*, 4 Atl. Rep. 578, have added one more to the leading cases on the constitutionality of laws creating classes of property for taxation, viewed in connection with the requirements of both state and federal constitutions. The case was argued by counsel of acknowledged ability, and in addition to the opinion of the court five others were filed, two concurring, one dissenting and two partially concurring, partially dissenting. The judgment of the Supreme Court, which was brought up for review, declared the Act of April 10th 1884 to be in contravention of the requirement of the state constitution that "property shall be assessed for taxes, under general laws and by uniform rules, according to its true value." The act referred to directed that all the property of railroad and canal companies used for railroad or canal purposes, including their franchises, should be assessed for taxation by a special state board appointed for the purpose, in the manner therein described, which differed materially, both in ascertaining values and in the rate of tax, from the assessment of other similar property not used for railroad or canal purposes. The view taken by the majority of the court is thus stated by Chancellor RUNYON: "The power of taxation is in the legislative branch of the government alone. It is unbounded except as it may be limited by constitutional restraint. A law which taxes a class of property separately is not unconstitutional if it embraces all property of that class and applies to it uniform rules, and taxes it according to its true value. The constitutionality of such a law is to be determined in the same way in which it would be determined if the property taxed were the only property taxed in the state;" and is also fairly summarized in the following extract from the dissenting opinion of Judge DEPUE: "As I understand the views of the majority of the court, it is not claimed that the Act of 1884 provides for taxation either for state or local purposes on a rule uniform with that on which taxes, state or local, are laid under the general tax act of 1866. The position taken is this: that the constitutional provision allows a classification of property for taxation under general laws, and that, upon such a classification the rule of uniformity prescribed by the constitution is complied with if the tax be laid upon property within the classification of an equal percentage, without regard to the rate of taxation upon other taxable property in the state; that local taxes may be laid on property in the classification at one rate, and upon other property at a different rate, and state taxes be levied with the same diversity in rates, provided only that a uniform rate be observed in the tax upon property within each class;